



REPUBLIC OF KENYA



**KENYA LAW**  
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**Telkom Kenya Limited v Ngokonyo & 2 others (Civil Appeal (Application)  
394 of 2017) [2024] KECA 164 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 164 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 394 OF 2017  
SG KAIRU, F TUIYOTT & JW LESSIT, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**TELKOM KENYA LIMITED ..... APPELLANT**

**AND**

**FRANCIS WAITHAKA NGOKONYO ..... 1<sup>ST</sup> RESPONDENT**

**SUDI ABDALLA ..... 2<sup>ND</sup> RESPONDENT**

**ANDREW MUGA ..... 3<sup>RD</sup> RESPONDENT**

*(An application to strike out the appellant/respondent's notice of appeal dated 8th January 2014, filed in court on 9th January, 2014 and the entire record of appeal arising from the Judgment of the High Court of Kenya at Nairobi (J. B. Havelock, J.) dated 20th December, 2013 in HCCC No. 357 of 1992)*

**RULING**

1. The Notice of Motion dated 6<sup>th</sup> December 2017 seeks the striking out of the Notice of Appeal dated and filed in court on 9<sup>th</sup> January 2014, and Memorandum of Appeal and the entire record of appeal comprising of volumes 1 and 2 filed herein on 23<sup>rd</sup> November, 2017. The motion is said to be anchored on rules 87 (1) and (2), 83, 84 and 87 (1) and (2) of the past [Rules](#) of this Court.
2. Aggrieved with the decision of the High Court (Havelock, J.) delivered on 20<sup>th</sup> December, 2013, Telkom, the appellant, filed a notice of appeal on 9<sup>th</sup> January, 2014. On the same day of filing, its advocates requested for proceedings. Both the notice of appeal and the letter bespeaking proceedings were served upon the respondents' advocates on 13<sup>th</sup> January, 2014.
3. There was a drag in typing of proceedings and so the advocates for the appellant, Oraro & Co. Advocates, offered to type them. After a back and forth, N.O. Sumba & Company Advocates, the advocates for the respondents, wrote on 2<sup>nd</sup> November, 2015 to the Deputy Registrar of the High



Court confirming that proceedings typed by the appellant's advocates were in order and that the court be at liberty to certify them as "true and correct." Not so! The High Court registry raised issues in regard to those proceedings and after several correspondences, the Deputy Registrar on 8<sup>th</sup> March, 2017 wrote to Oraro & Co. Advocates, copying N. O. Sumba & Co. Advocates, informing them that the typed proceedings were ready for collection upon payment of court fees of KShs.6,000.00. There was then a similar letter of 12<sup>th</sup> April, 2017 which advised that the fees to be paid was KShs.5,880.00. The fees for proceedings was paid by the appellant's advocates on 26<sup>th</sup> April 2017, after which they collected proceedings on 2<sup>nd</sup> May 2017.

4. The advocates for the respondents contend that the time for filing the record of appeal lapsed on 6<sup>th</sup> May 2015 being at least 60 days after 3<sup>rd</sup> March 2017 when the Deputy Registrar first advised that the proceedings were ready and after factoring in an additional 4 days as allowance for receipt of a letter sent by mail box within Nairobi.
5. On 11<sup>th</sup> September, 2017, the respondents filed Civil Application No. 210 of 2017 before this Court seeking to deem the notice of appeal dated 8<sup>th</sup> January, 2014 as withdrawn on grounds that time within which to file the appeal had lapsed. The respondents assert that it was only after the appellants' advocates were served with the said application that the said advocates woke up from "a long slumber" and wrote to the Deputy Registrar seeking what it contended to be part of missing proceedings to circumvent the application. The respondents explain that the proceedings sought were subject of a judgment delivered by Hayanga, J. on 11<sup>th</sup> April, 2008 which eventually were the subject of Civil Appeal No. 83 of 2007 before this Court, an appeal which was allowed on 2<sup>nd</sup> July 2014 ordering a fresh trial. The respondents do not think those proceedings to be relevant to the current appeal and wonder why the issue of them missing was not raised on 26<sup>th</sup> April, 2017 when the appellant's advocates paid for the proceedings or on 2<sup>nd</sup> May, 2017 when they collected them.
6. An answer is proffered by Noelle C. Lubano, a partner in the firm of Oraro & Co. Advocates acting for the appellant in a replying affidavit sworn on 16<sup>th</sup> April, 2019. That upon collecting the proceedings on 2<sup>nd</sup> May, 2017 and reviewing them, it came to their attention that the proceedings were incomplete as they ran from 20<sup>th</sup> September 2012 to 1<sup>st</sup> July 2015 whereas the suit was filed in 1992. She avers that their clerk a Mr. Victor Killi followed up the issue on several unsuccessful visits to the Deputy Registrar.
7. In a letter dated 17<sup>th</sup> December, 2017, the said advocates requested that the matter be set down for mention before a Judge for directions. While she asserts that the directions to be sought would be in regard to securing the remaining proceedings, that is not mentioned in the letter. An issue we shall certainly return to. The matter was set down for mention on 4<sup>th</sup> October 2017 and the mention notice dated 22<sup>nd</sup> September 2017 was received by the respondent's advocates on 26<sup>th</sup> September, 2017 under protest on grounds that the advocate handling the matter was engaged elsewhere. Fast forward, by a letter dated 13<sup>th</sup> October, 2017 the Deputy Registrar notified the advocates for both sides that a complete set of proceedings was ready for collection upon payment of requisite fees and subsequently issued a certificate of delay on 15<sup>th</sup> November 2015. The advocates for the appellant do not perceive the record of appeal to be late.
8. At plenary hearing, learned counsel Mr. Sumba represented the respondents while Mr. Chacha Odera appeared for the appellant. Both gave brief highlights of their filed submissions and fielded questions from Court.
9. It is not in dispute that the proceedings which were the subject of the judgment delivered by Hayanga, J. were not part of the proceedings that were available for collection on 8<sup>th</sup> March 2017, paid for on 26<sup>th</sup> April 2017 and collected on 2<sup>nd</sup> May 2017 by the appellant's advocates. A contention by counsel



for the respondents is that those proceedings are not relevant to the current appeal. This, however, is not an issue we can determine. It is a call to be made by the bench which will hear the appeal, should we disallow the application before us. It however seems to us that the record of proceedings before the trial court cannot be said to be complete unless the entire proceedings before that court, even those preceding the decision of Hayanga, J., are on record. We therefore come to the quick answer that the proceedings later obtained by the appellants were in fact necessary proceedings.

10. Next is the argument by the respondent that the appellant only sought for the missing proceedings after its advocates had been served with the respondent's striking out motion (Civil Application No. 210 of 2017) on 13<sup>th</sup> September, 2017 and was in fact a wake up from "a long slumber". Miss Lubano confronted this proposition by averring that; upon it coming to her firm's attention that the proceedings were incomplete, she asked their clerk one Victor Kiili to follow up the matter with the Deputy Registrar, which he did in vain; this prompted her to write to the Deputy Registrar on 17<sup>th</sup> August 2017 requesting the matter to be mentioned before the Judge for directions with regards to resolving the matter.

11. The letter of 17<sup>th</sup> August 2017 is short and reads:

"TKL1.8 17<sup>th</sup> August, 2017

Deputy Registrar High Court of Kenya

Milimani Commercial Courts Nairobi

Dear Sir,

RE: NRB HCCC No. 357 of 1992

Francis Waithaka Ngokonyo & 2 Others vs. Telkom (K) Ltd

We refer to the above matter.

Kindly give us a mention date before Justice Ochieng for purposes of obtaining directions.

Yours faithfully,

Oraro & Company Advocates Signed

Noella Lubano"

Of note is that the letter was copied to the respondents' advocates who have not denied receiving it.

12. While the letter does not state the purpose why the mention is sought, the reason advanced by Miss Lubano in her affidavit before has not been debunked and we have no reason to disbelieve her. If we accept this explanation, as we do, then we have to conclude that the appellant's quest for the remainder of the proceedings was not in reaction to the striking out motion.

13. Having made that holding, the rest of the events are not controversial. By a letter dated 13<sup>th</sup> October 2017, the Deputy Registrar of the High Court informed advocates for both parties that the hereto missing proceedings were ready for collection upon payment of KShs. 2,220.00 being the requisite court charges. Subsequently, a certificate of delay dated 15<sup>th</sup> November, 2017 was issued by the Deputy Registrar indicating that the time taken by that court to prepare and supply the defendant (appellant herein) certified copies of the proceedings, was from 14<sup>th</sup> January, 2014 to 13<sup>th</sup> October 2017 being 1,332 days. This period, obviously, includes the period required to prepare and supply the latter proceedings and the certificate cannot in the circumstances of this case be faulted.



14. As the record of appeal was filed in this Court on 25<sup>th</sup> November 2017, within 60 days of 13<sup>th</sup> October 2017, then it was filed on time. The Notice of Motion dated 6<sup>th</sup> December 2017 is without merit and is for disallowing. It is hereby dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024.**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

I certify this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

